No. 48947-3-II

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION II

TAZMINA VERJEE-VAN,

Appellant,

vs.

PIERCE COUNTY, a subdivision of the State of Washington; and PLANNING AND LAND SERVICES DEPARTMENT (PALS), a department of Pierce County;

Respondents.

APPEAL FROM THE SUPERIOR COURT
OF PIERCE COUNTY
Cause No. 14-2-09794-3

AMENDED REPLY BRIEF OF APPELLANT

Brett A. Purtzer
WSB #17283

HESTER LAW GROUP, INC., P.S.
Attorneys for Appellant
1008 South Yakima Avenue, Suite 302
Tacoma, Washington 98405
(253) 272-2157

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TABLE OF AUTHORITIES

Cases

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I. STATEMENT OF THE CASE

Appellant relies upon the statement of facts set forth in her opening brief.

II. ARGUMENT

A. The County Has an Obligation to Properly Apply the Pierce County Code and the Shoreline Management Act to Structures on Lake Tapps.

The County's response focuses on its belief that Ms. Verjee-Van seeks a writ of mandamus to compel the County to bring a code enforcement action against the Borgert pier and the Abercrombie fence. Respondent's Brief at 1. That is not the relief appellant requested. Rather, appellant seeks a writ of mandamus to compel the County to properly apply the Pierce County Code and the Shoreline Management Act to the illegal Borgert and Abercrombie structures. CP 9.

To accept the County's position that it has no obligation to oversee development in waterfront areas would relegate the Shoreline Management Act to a nullity. Rather, and as set forth within appellant's opening brief, PCC 20.02.030 states that no construction on lands "subject to the Shoreline Management Act of 1971 shall be undertaken except in compliance with the provisions of this title and then only after securing all required permits." Nothing could be more clear as to the County's obligation to properly follow and apply the shoreline code to structures that are constructed in areas subject to the Shoreline Management Act.

Appellant is not seeking an enforcement action against the Abercrombies and Mr. Borgert. Appellant is requesting that the Court mandate that the County properly apply the codes to these illegal structures. The County is fully aware of the codes that must be followed before structures can be built, yet clearly shirked its responsibilities with both structures. Under such

circumstances, the County, which is the steward of the Shoreline Management Act as it applies to Pierce County, has an obligation to act such that uniform development will occur in shoreline areas. To suggest that the County can pick and choose when it is to apply the laws lacks credulity.

B. The County Has a Clear Duty to Apply the Pierce County Code to All Structures Subject to the Shoreline Management Act.

The County suggests that appellant seeks a writ of mandamus to compel the County to engage in a general course of conduct, citing Walker v. Monroe, 124 Wn.2d 402, 879 P.2d 920 (1994). Appellant is not seeking the writ to compel a general course of conduct. Rather, appellant is seeking the writ to enforce specific conduct.

The Shoreline Management Act sets forth what must be done before development occurs along the shorelines of statewide significance and as mandated pursuant to PCC § 20.02.030. Appellant seeks a writ from the Court to order the County to properly follow these codes. The County suggests that it can arbitrarily decide when the codes should be followed. This behavior is specifically what this Court corrected in Clark County Sheriff v. Dept. of Social & Health Services, 95 Wn.2d 445, 626 P.2d 6 (1981).

In Clark County, the trial court ordered the Department of Social & Health Services to accept all convicted felons offered by the sheriff for transfer to a reception center, which was required by statute. The DSHS director suggested that he had discretionary power to delay acceptance, and he repeatedly accepted less than half the persons offered for transfer and took the position that he could continue to do so. This Court upheld the Superior Court's order granting a writ of mandamus to compel the Department of Social and Health Services to accept the felons as required by statute. Clark County, 95 Wn.2d at 450.

Here, appellant urges this Court to reverse the trial court and remand with instructions to order the same relief. The County is required to follow the PCC such that all shoreline development remains uniform. The County asserts that it has no obligation to do so. Respectfully, such position is arbitrary and capricious and should not be condoned.

As set forth in appellant's opening brief, the County, after writing the DNS, took no further action related to the Borgert pier. Pursuant to WAC 197-11-340(2)(b), "the responsible official shall send the DNS and environmental checklist to agencies with jurisdiction, the Department of Ecology, and affected tribes, and each local agency or political subdivision whose public services would be changed as a result of implementation of the proposal and shall give notice under WAC 197-11-510." No evidence exists that the DNS was ever sent to the Department of Ecology or any other agency with jurisdiction. Clearly, the County must take certain steps so that all interested entities are notified of specific shoreline development activities. The WAC language is mandatory, not permissive. As such, the County did not fulfill its mandatory obligations, and, therefore, no valid permit issued.

Projects that do not follow the code requirements are routinely rejected by the Shoreline Hearings Board, which would have occurred in this case had the County followed what it was required to do. See Moe and Grays Harbor County v. State of Washington, Dept. of Ecology, SHB No. 78-15 (Appendix 001-006) (Grays Harbor County did not comply with the applicable provisions of WAC 197-11-340 as it failed to issue a proposed declaration of nonsignificance and to thereby provide the Department of Ecology, an agency with jurisdiction, with the mandatory 15 day period in which to file written comments prior to acting on the shoreline permit) and Lassiter v. Kitsap County, SHB No. 86-23 (Appendix 007-019).

The same situation surrounds the Abercrombie fence and the appropriateness of the setbacks that apply, which the County has never enforced. See Madden v. Dorothy Grenley, et al.,, SHB No. 80-30 (Appendix 020-032). Respectfully, the County cannot ignore what it is required to do when dealing with issues surrounding shoreline development. Respectfully, this Court should reverse the trial court and direct that a writ should be issued.

C. No Final Decisions Have Been Issued on the Borgert Pier or Abercrombie Fence.

In Respondents' Brief, the County routinely references that appellant can seek no relief because a "final" land use decision issued related to the Borgert pier and Abercrombie fence. See Respondents' Brief at 1, 13, 15, 19. As set forth in the prior sections of this brief, no final decision was issued for the Borgert pier.

With respect to the Abercrombie fence, the County asserts that an email sent to counsel referencing the Abercrombie fence constituted a "final" decision, and that appellant failed to timely appeal this final decision. See Respondent's Brief at 13-14. Respectfully, nothing within the email remotely suggests that it is a final decision. CP 71.

PCC Chapter 18.80 sets forth the notice provisions under the Pierce County Code. Pursuant to 18.80.030(D), notice of final decision, is set forth as follows:

> **1. Time Period.** The Department or Hearing Examiner shall provide a notice of final decision to the applicant and to any person who, prior to the rendering of the decision, requested specifically, in writing, a notice of the decision. This notice shall be provided within 10 days from the issuance of the final decision.
>
> **2. Content.** The notice of final decision may be a copy of the report, permit or decision on the application and shall include a statement or any threshold determination or an adopted Environmental Impact Statement if applicable, as set forth in Title 18D PCC, Development Regulations – Environmental, **and the procedures for administrative appeal**, if applicable.

(Emphasis added)

PCC 1.22.090.B sets forth time limits from which to appeal an administrative decision. PCC 1.22.090.B.1.b states that "the Administrative Official shall prepare a written report regarding the administrative decision." Here, with respect to the Abercrombie fence, no administrative decision ever occurred or resulted in a final decision. Rather, an email was sent, and nothing within the email provides the "procedures for administrative appeal" per PCC 18.80.030(D)(2). Clearly, the email the County suggests was a final decision does not comply with the code provisions, and is yet another example of the County's cavalier attitude toward code requirements.

D. The Petition for Writ of Mandamus was Timely.

Given that no final decision has been issued related to the Abercrombie fence or the Borgert pier, this writ of mandamus is absolutely timely. No agency decision has been issued related to the Abercrombie fence, and clearly, the County never sent the DNS to the Department of Ecology, or any other entities, as required by WAC 197-11-340(2)(b). As such, because no final decision has issued related to either structure, this writ of mandamus is timely.

E. The Doctrine of Finality Does Not Preclude the Writ of Mandamus To Be Issued.

As set forth within appellant's opening brief, the cases cited by the County clearly dealt with final decisions. Here, no final decision has been issued for either the Abercrombie fence or the Borgert pier. The County urges that the passage of time constitutes a final decision. Nothing within the Pierce County Code, WACs or RCWs supports the County's contention. Accordingly, and based upon the aforementioned, no final decision has issued for either structure, and, therefore, the doctrine of finality does not preclude the writ of mandamus from being issued.

III. CONCLUSION

Ms. Verjee-Van respectfully requests that this Court reverse the trial court and order that a writ of mandamus be issued requiring Pierce County to properly administer the regulations dealing with shoreline development on Lake Tapps such that appellant can enjoy her property. Alternatively, appellant requests that this Court reverse the trial court and order that a trial be held because material issues of fact exist surrounding the propriety of the writ of mandamus.

IV. APPENDIX

A-001 Moe and Grays Harbor County v. State of Washington, Department of Ecology, SHB No. 78-15

A-007 Lassiter v. Kitsap County, SHB NO. 86-23

A-020 Madden v. Grenley, Pierce County, and State of Washington, Department of Ecology, SHB No. 80-30

DATED THIS 21st day of March, 2017.

HESTER LAW GROUP, INC., P.S.
Attorneys for Appellant

By: _____
Brett A. Purtzer
WSB# 27813

CERTIFICATE OF SERVICE

I certify that on the day below set forth, I caused a true and correct copy of this reply brief to be served on the following in the manner indicated below:

Counsel for Respondent

Cort T. O'Connor
Deputy Prosecuting Attorney
955 Tacoma Avenue South #301
Tacoma, WA 98402-2160

☐U.S. Mail
☐Hand Delivery
☐ABC-Legal Messengers
☒Email

Appellant

Tazmina Verjee-Van
4225 Lakeridge Drive E
Lake Tapps, WA 98391

☐U.S. Mail
☐Hand Delivery
☐ABC-Legal Messengers
☒Email

Signed at Tacoma, Washington this 21st day of March, 2017.

Kathy A. Herbstler

BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A CONDITIONAL USE PERMIT GRANTED TO HOWARD MOE BY GRAYS HARBOR COUNTY AND DENIED BY THE DEPARTMENT OF ECOLOGY	SHB No. 78-15
HOWARD I. MOE (Little Hoquiam Boat Shop) and GRAYS HARBOR COUNTY, Appellants, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent.	ORDER OF REMAND

A "Motion for Summary Judgment" in the above matter by respondent Department of Ecology came on for hearing before the Shorelines Hearings Board, Dave J. Mooney, Chairman, and Chris Smith, David A. Akana, Robert E. Beaty, and Rodney Proctor, Members, on August 7, 1978 in Lacey, Washington. Hearing examiner William A. Harrison presided.

Appellant Howard I. Moe was represented by his attorney Stanley J.

Krause. Appellant Grays Harbor County was represented by Douglas C. Lewis, Deputy Prosecutor. Respondent, Department of Ecology was represented by Robert V. Jensen, Assistant Attorney General.

Department of Ecology made timely "Motion for Summary Judgment" on two distinct grounds: (1) that appellant Grays Harbor County failed to comply with WAC 197-10-340 governing threshold determinations under the State Environmental Policy Act of 1971 (SEPA), 43.21C RCW and (2) that appellant's negative threshold determination was clearly erroneous.

Having heard the oral argument of counsel and having considered the following affidavits and exhibits placed before it:

A. Affidavits of Robert V. Jensen dated July 24, 1978 and July 28, 1978.

B. Affidavit of Pete Haskin dated August 4, 1978.

C. Affidavit of Howard I. Moe dated August 3, 1978.

D. Affidavit of Omar Youmans dated August 3, 1978.

E. Affidavit of Tom Mark dated August 4, 1978.

F. Exhibits referred to within the above Affidavits.

and being fully advised, the Shorelines Hearings Board makes these

FINDINGS OF FACT

I

Appellant Howard I. Moe, made application to Grays Harbor County for a shoreline conditional use permit for a substantial development under 90.58 RCW in February, 1978. The proposed development consisted of placing fill and constructing a boat shop within a 24-acre site.

II

Appellant Grays Harbor County as lead agency for this proposal,

issued a final Declaration of Non-Significance under SEPA, 43.21C RCW, on March 30, 1978; and, on the same date, granted the Moe application for a shoreline conditional use permit for a substantial development. The Declaration of Non-Significance was sent to the Department of Ecology after, not before, Grays Harbor County granted the shoreline permit. This fact was not in issue.

III

Department of Ecology denied the shoreline conditional use permit for a substantial development on May 3, 1978. Appellants requested that the Shorelines Hearings Board review this denial. The present motion of Department of Ecology is made within that proceeding now before us.

IV

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Findings, the Board makes these

CONCLUSIONS OF LAW

I

The rules implementing the State Environmental Policy Act provide, at WAC 197-10-340:

> . . .
>
> (2) The lead agency shall prepare a final declaration of nonsignificance for all proposals except for those listed in subsection (3) below.
>
> (3) A lead agency making a threshold determination of nonsignificance for any of the following proposals shall prepare a proposed declaration of nonsignificance, and comply with the requirements of subsection (4) through (7) below prior to taking any further action on the proposal;

> (a) Proposals which have another agency with jurisdiction, except that agencies may specify in their own agency SEPA guidelines specific situations in which written concurrence may be obtained from the other agency or agencies with jurisdiction and the proposed declaration of nonsignificance omitted and a final declaration of nonsignificance issued.
>
> . . .
>
> (4) The lead agency shall issue all proposed declarations of nonsignificance by sending the proposed declaration and environmental checklist to other agencies with jurisdiction.
>
> (5) Any person or agency may submit written comments on the proposed declaration of nonsignificance to the lead agency within fifteen days from the date of its issuance. The lead agency shall take no further action on the proposal, which is the subject of the proposed declaration of nonsignificance, for fifteen days from the date of issuance. If comments are received, the lead agency shall reconsider its proposed declaration; however, the lead agency is not required to modify its proposed declaration of nonsignificance to reflect the comments received.
>
> (6) After the fifteen day time period, and after considering any comments, the lead agency shall adopt its proposed declaration as a "Final Declaration of Nonsignificance," determine that the proposal is significant, or utilize the additional information gathering mechanisms of WAC 197-10-330(1).

These rules further provide at WAC 197-10-040(4):

> Agency with jurisdiction means an agency from which a nonexempt license is required for a proposal or any part thereof, which will act upon an application for a grant or loan for a proposal, or which proposes or initiates any governmental action of a project of non-project nature.

II

The Department of Ecology is an agency with jurisdiction under the

above definition, WAC 197-10-040(4), since it must make the final decision on any shoreline permit for a conditional use. RCW 90.58.140(12) Appellant, Grays Harbor County, did not comply with the applicable provisions of WAC 197-10-340 as it failed to issue a proposed declaration of nonsignificance and to thereby provide the Department of Ecology, an agency with jurisdiction, with the mandatory fifteen day period in which to file written comments prior to acting on the shoreline permit. The consequence of this failure by Grays Harbor County was both to prevent reception of Department of Ecology's comments and, further, to prevent Department of Ecology, if it disagreed with the finding of nonsignificance from assuming lead agency status under WAC 197-10-345, which may only be accomplished within this fifteen day period. By assuming lead agency status, Department of Ecology would then be entitled to assume responsibility for the preparation of an environmental impact statement.

For these reasons, the Grays Harbor County's approval of the subject shoreline conditional use permit for a substantial development should be reversed and remanded for full compliance with the provisions of WAC 197-10-340. Nothing herein establishes that there are not other agencies with jurisdiction in addition to the Department of Ecology, under the definition of such agencies appearing at WAC 197-10-040(4) cited above.

III

Because of our conclusion that WAC 197-10-340 was violated, we do not reach the question of whether the declaration of nonsignificance issued by Grays Harbor County was clearly erroneous.

IV

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Conclusions the Board enters this

ORDER

Grays Harbor County's approval of the shoreline conditional use permit for a substantial development in this matter is hereby reversed and remanded.

DONE at Lacey, Washington this 15TH day of August, 1978.

SHORELINES HEARINGS BOARD

DAVE J. MOONEY, Chairman

CHRIS SMITH, Member

DAVID A. AKANA, Member

ROBERT E. BEATY, Member

RODNEY PROCTOR, Member

BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A SHORELINE SUBSTANTIAL DEVELOPMENT PERMIT RESCINDED BY KITSAP COUNTY, KENNETH C. LASSITER, Appellant, v. KITSAP COUNTY and ILLAHEE BETTERMENT COMMITTEE, Respondents.	SHB No. 86-23 ORDER OF REMAND

This matter, a request for review of the action of Kitsap County on the application for a shoreline substantial development permit of Kenneth Lassiter for floating fish pens on Port Orchard Bay in Kitsap County, came on for hearing before the Shorelines Hearings Board; Lawrence J. Faulk (presiding), Wick Dufford, Nancy R. Burnett, Rodney M. Kerslake, and Robert Schofield, convened at Bremerton, Washington, on August 28, 1986.

Appellant represented himself. Respondent Illahee Betterment

Committee was represented by John C. Merkel of the law firm of Merkel, Caine, Jory, Donohue, and Duvall. Respondent County appeared and was represented by Scott M. Missall, Deputy Prosecuting Attorney.

The proceedings were reported by Cheri L. Davidson of Gene Barker and Associates. Exhibits were admitted and examined. Argument was heard.

PROCEDURE

On August 22, 1986, respondent Kitsap County filed a motion to remand the matter back to Kitsap County. On August 27, 1986, appellant Lassiter filed a memorandum in opposition to the motion.

Without objection, this motion was argued before the Board, prior to starting the evidentiary portion of the hearing on August 28, 1986. This order confirms the ruling made orally at the conclusion of argument after consideration by the Board.

RECORD

Pursuant to the Pre-Hearing Order herein the parties provided to the Board copies of their documentary exhibits. Included therein were the complete files of materials considered by the County in acting on the subject substantial development permit application and the related application for a home occupation/conditional use permit under the County's zoning ordinance. (R-1-1 through R-1-79 and R-2-1 through R2-21.)

In preparing this decision the Board considered the County's entire record. In addition, the Board considered Exhibits R-3, R-10, R-11, R-16 through R-24 and each of appellants Exhibits: A-1 through

A-53. These documents are more particularly described on the exhibit lists annexed hereto as Appendix A. (There is some overlap in the lists.) Prior to arguments the admission of all documents on these exhibit lists was agreed to.

The Board also considered the briefs of the parties and the exhibits attached thereto. These included Exhibits A through G to Respondent's Motions for Remand, Motion Brief and Trial Brief (County); Exhibits 1 and 2 to Illahee Betterment Committee Brief re Opposition to Reinstatement of SDP #452; Exhibits 1 through 4 to Appellant's Response in Opposition to Respondent's Motions for Remand. (Again, there is some overlap in the exhibits included with the briefs and the exhibits set forth on the exhibit lists.)

FACTS

We find that the following facts are uncontroverted on the record before this Board.

I

Appellant Kenneth Lassiter submitted to Kitsap County an application for a shoreline substantial development permit on July 15, 1985. The application described the project as: "Aquaculture: floating pens and walkway." With the application, a vicinity map showing the site and two drawings illustrating project features were submitted.

II

Concurrently with the filing of the application, Lassiter submitted to the County a completed environmental checklist.

On this checklist all of the questions under "Water" were marked "N/A" (not applicable). These included inquiries about work to be done over or in the water, and about possible discharges of waste materials to surface waters.

In the section about "Animals," the measures proposed to preserve or enhance wildlife were: "Leave them alone, allow no hunting."

Under "Environmental Health," the question about environmental health hazards was answered, "None." The question about noise was answered, "Little or no noise."

Under "Aesthetics," the response asserted that no views would be altered and proposed no measures to reduce aesthetic impacts.

Under "Light and Glare" all questions about impacts were marked "None."

In the section dealing with "Recreation," the answer to the question about recreation opportunities in the area made no mention of activities in, on or under the water and said no recreation uses would be displaced. The answer to the question on proposed measures to reduce or control impacts on recreation was:

"Project will be educational/experimental."

Under "Transportation," all questions relating to impacts were answered "No" or "None."

III

Taken together the Lassiter's application and checklist reveal the physical components of his project only in the sketchiest detail and provide almost no information on the operational aspects of the

proposal.

IV

On August 16, 1985, the County notified adjacent property owners of a public hearing to be held on September 23, 1985, on the Lassiter application. The notice solicited either attendance or written comments.

V

On August 27, 1985, the County issued a Determination of Nonsignificance (DNS) for the Lassiter application, describing the proposal as: "Shoreline Substantial Development Permit No. 452 for placement of four net pens approximately 70' x 70'."

The DNS stated that no action would be taken on the proposal for fifteen days and asked for comments to be submitted by September 11, 1985. Under "Comments," the DNS stated:

> The scale of the proposal will limit adverse impacts to minor levels. The project will create a minor obstruction to near shore boat traffic.

Copies of the DNS were sent to various state agencies and the Suquamish Tribe. Arrangements were made for it to be published on September 4, 1985.

VI

No comments on the DNS were received within the 15-day comment period. Only the Suquamish Tribe provided a substantive response. The tribe did not object to the project, but pointed out a number of areas of potential impact not addressed in the DNS: predation on outmigrating chum fry by salmon held in pens; interference with

existing net fisheries; need for navigation markers; effects of accumulations of uneaten food and fecal material below the pens.

VIII

Prior to and immediately after the hearing on September 23, 1985, the County received letters from citizens opposing the project. These letters voiced numerous environmental concerns, including the effects of waste products from fish and excess feed both under the nets and as affected by tides; road traffic on the uplands and boat traffic to the pens; effects on predatory birds and marine mammals; fishing, navigation and recreation impacts; effects on views and compatibility of a commercial operation with the residential neighborhood.

Similar sentiments were expressed at the hearing itself. Also at the hearing Mr. Lassiter explained that fish would be gutted on his upland property which fronts on the proposed site of the anchored pens.

On September 25, 1985, Lassiter by letter provided more information to the County about his plans for harvesting, on-site processing, and sale of fish and wastes. He said that these matters would be the subject of a separate hearing on a conditional use permit.

VIII

On October 7, 1985, the County Commissioners approved the substantial development permit subject to enumerated conditions, including a requirement for obtaining home occupation/conditional use permits under the County zoning code. The County's apparent intention was to use the processing of these additional permits as the vehicle

for reviewing the various environmental concerns which had been raised.

The County forwarded the permit to Lassiter and to the Department of Ecology. Subsequently on October 29, 1985, the County requested that Ecology return the permit pending consideration of the zoning issues.

IX

On December 20, 1985, Lassiter applied for home occupation/conditional use permits. Notice of hearing was made on January 29, 1986.

On February 3, 1986, Lassiter wrote the County outlining measures for on-site fish processing. On February 10, he wrote again stating that the home occupation/conditional use application was not for on-site processing of fish on his property.

The hearing, held February 13, 1986, was directed to use of the house on Lassiter's property for office and storage space in conjunction with the aquaculture project. The proposed storage was for fish feed to be transported from the house down the bank by footpath to the beach.

Opponents raised questions about access for delivery traffic, rodent control, aesthetics, handling of dead fish, and compatibility of the business with the residential neighborhood.

The hearing examiner denied the requested permits by a decision dated March 4, 1985. In the decision he found that final action on the shoreline substantial development permit had been "tabled" until a decision was made on the upland uses. He also found that under

Lassiter's proposal fish would not be processed on the upland portion of the property.

X

Lassiter appealed the hearing examiner's decision to the County Commissioners who held a hearing on the matter on April 7, 1986. At the hearing the same kinds of environmental concerns as expressed in earlier proceedings were raised. On May 12, 1986, the Commissioners denied Lassiter's appeal, adopted the findings of the hearing examiner and rescinded the substantial development permit for failure to satisfy the requirement to obtain home occupation/conditional use permits.

At no point in the entire process did the County ever purport to reconsider the DNS issued on August 27, 1985.

Lassiter's appeal to this Board was filed on May 28, 1986.

XI

On the record, neither the physical nor the operational features of Lassiter's project have been completely disclosed. An example of the former is the lack of reviewable plans for the anchoring system to be used for the pens. The effects of tidal action and storms, the impacts on navigation and other uses cannot be evaluated absent such information.

For an example of the latter, no clear idea of how fish processing is to be carried out has been provided. The very nature of the rearing project necessarily presupposes the killing and processing of fish at some location, whether on appellant's property or not. The impacts of such activity cannot be evaluated without knowing where and how it will be done.

XII

Since the issuance of the DNS in this matter, the County has become aware of a growing body of scientific literature and expert opinion expressing concerns about the environmental effects of fish farming using floating pens. Potential water quality problems are suggested by the comparison of fish pens to feedlots. Possible health impacts on both marine life and humans are presented by the introduction of antibiotics from fish food into the water.

CONCLUSIONS

We have decided to grant the County's motion to remand and do so on the basis of the following legal conclusions.

I

The permit system of the Shoreline Management Act is inextricably interrelated with and supplemented by the requirements of the State Environmental Policy Act (SEPA), chapter 43.21C RCW. Sisley v. San Juan County, 89 Wn. 2d 78, 569 P.2d 712 (1977). The Board's function includes review of compliance with the requirements of SEPA.

II

Compliance with the procedural requirements of SEPA is a statutorily mandated function imposed on the lead permitting agency for a project, here Kitsap County. Juanita Bay Valley Community Association v. Kirkland, 9 Wn. App. 59, 510 P.2d 1140 (1973); WAC 197-11-050.

III

This Board conducts de novo review of decisions brought before it

on an independent record and may approve or condition the approval of substantial development permits. San Juan County v. Department of Natural Resources, 28 Wn. App. 796, 626 P. 2d 995 (1981).

However, as a quasi judicial body, the Board does not itself perform procedural functions, statutorily assigned to the entities it reviews. See WAC 197-11-800 (12)(b). Therefore, the Board's review of SEPA procedural compliance involves the possibility of a remand to the entity which should perform the procedures.

Such review is appropriate even where, as here, the decision reviewed was essentially to deny a permit. Otherwise, this Board's approval of the permit on review could mean approval of a project without the mandates of SEPA ever having been complied with.

IV

The threshold decision under SEPA is whether or not an environmental impact statement must be prepared. WAC 197-11-797. For this decision to be made properly, the agency must possess "information reasonably sufficient to evaluate the environmental impact of a proposal." WAC 197-11-335.

V

To meet the "reasonably sufficient" information requirement, a project must be defined with enough detail that its likely effects can be ascertained. See WAC 197-11-060(3). The effects include direct, indirect and cumulative (or precedential) impacts. See WAC 197-11-792.

We conclude that the Lassiter project has not been properly

defined as contemplated by the SEPA regulations and that, as a result, the threshold determination was not based on information "reasonably sufficient" to evaluate its environmental impacts. The incompleteness and inaccuracy of the responses to the environmental checklist provide an additional basis for this conclusion. See Whittle v. Westport, SHB No. 81-10 (Aug. 4, 1981).

VI

We also conclude that, as a matter of law, the County failed to comply with WAC 197-11-340(3). That subsection reads:

> (3)(a) The lead agency shall withdraw a DNS if:
> (i) there are substantial changes to a proposal so that the proposal is likely to have significant adverse environmental impacts;
> (ii) There is significant new information indicating, or on, a proposal's probable significant adverse environmental impacts; or
> (iii) The DNS was procured by misrepresentation or lack of material disclosure; if such DNS resulted from the actions of an applicant, any subsequent environmental checklist on the proposal shall be prepared directly by the lead agency or its consultant at the expense of the applicant.
> (b) Subsection (3)(a)(ii) shall not apply when a nonexempt license has been issued on a private project.
> (c) If the lead agency withdraws a DNS, the agency shall make a new threshold determination and notify other agencies with jurisdiction of the withdrawal and new threshold determination. If a DS is issued, each agency with jurisdiction shall commence action to suspend, modify, or revoke any approvals until the necessary environmental review has occurred (see also 197-11-070).

Withdrawal of a DNS is mandatory when any of the subheadings of subsection (a) apply.

For the purposes of the regulation, we hold that the permit in

question was never issued. Under the circumstances, the DNS should have been withdrawn because of significant new information on probable significant adverse impacts.

Moreover, we decide that the DNS was procured by both misrepresentation and lack of material disclosure. In this situation, failure to withdraw the DNS constituted legal error.

VII

The matter should be remanded to the County for consideration of the threshold determination in light of an adequate definition of the project, correct and complete responses to the environmenal checklist and new information on likely impacts.

In reaching this decision, we do not reach the issue of what the threshold decision, when properly made, ought to be. The substantive factual question of whether there is a "reasonable probability of a more than moderate effect on the quality of the environment," ASARCO v. Air Quality Coalition, 92 Wn. 2d 685, 601 P. 2d 501 (1979), is for the County to answer on remand. We decide only that this question must be answered on the basis of more information.

ORDER

The matter is remanded to Kitsap County for reconsideration consistent with the foregoing decision.

This is a final determination of this action. Any proceedings which may arise from any future action of the County on the project shall constitute a new and separate case before this Board.

DONE this 16th day of October, 1986.

SHORELINES HEARINGS BOARD

10/27/86
LAWRENCE J. FAULK, Chairman

WICK DUFFORD, Lawyer Member

NANCY R. BURNETT, Member

RODNEY M. KERSHAKE, Member

Not Available for Signature
ROBERT SCHOFIELD, Member

BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A SHORELINE VARIANCE PERMIT ISSUED BY PIERCE COUNTY TO DOROTHY GRENLEY, PETER MADDEN, Appellant, v. DOROTHY GRENLEY, PIERCE COUNTY, and STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondents.	SHB No. 80-30 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter, the request for review from the issuance of a shoreline variance permit to respondent Dorothy Grenley by Pierce County and its approval by the Department of Ecology, came before the Shorelines Hearings Board, Nat W. Washington, presiding, Gayle Rothrock, Rodney Kerslake, Steven Tilley, and Richard A. O'Neal, Members, in Lacey, Washington, on March 27, 1981.

Appellant Peter Madden was represented by his attorney William H. Griffies and respondent Dorothy Grenley was represented by her attorney Marshall D. Adams.

Having heard or read the testimony, having examined the exhibits, and having considered the parties' contentions, arguments and briefs, the Shorelines Hearings Board now makes these

FINDINGS OF FACT

I

Appellant Peter Madden and respondent Dorothy Grenley reside on contiguous pieces of property fronting on Gravelly Lake, a 200-plus acre, non-navigable lake in Pierce County, Washington. A series of disagreements arose between the parties involving trespass on appellant's property by respondent's dog and trespass on respondent's property by appellant's young daughter, which culminated in a court action charging respondent's husband with harboring a dangerous dog. The court action was resolved in favor of respondent's husband. Thereafter, respondent and her husband built a six-foot high chain link fence from the street side of their property along what they believed to be their southerly property line to a bulkhead which marks the line of ordinary high water, a distance of about 360 feet. The fence continued waterward from the bulkhead for a distance of about 15 feet to about the line of mean low water.

During low water the fence was entirely on dry land, but during high water all of the fence waterward from the lower bulkhead extended into the water.

There are two bulkheads on respondent's property. One which is approximately 2-1/2 feet high is located on the shoreline and establishes the line of ordinary high water. A second bulkhead is located up the slope, approximately 6 to 8 feet landward of the first.

II

Appellant and his wife brought an action in Superior Court against respondent and her husband claiming that the fence encroached upon their property. The court in establishing the common boundary found that the major portion of the fence did not encroach on appellant's property. It was determined, however, that the short stretch extending waterward from the lower bulkhead was on appellant's property. Respondent and her husband removed this section of the fence. They were informed by the Pierce County Planning Department that before reconstructing the waterward section of the fence on their own property, they would need a variance. On April 22, 1980, respondent Dorothy Grenley applied for a variance to construct a six-foot chain link fence which would extend 15 feet waterward from the bulkhead.

A substantial development permit with a variance (Exhibit A-12) was granted by the hearing examiner for the county on July 9, 1980, with the following conditions:

1. The fence shall not be constructed upon the property of the adjacent property owners.

2. Construction should be undertaken in such a manner as to cause little disruption of the lake as possible.

3. The fence shall be hinged like a gate so that the extremity can be moved northerly to the Grenley property as the water level rises and southerly as the water level recedes so that at all times the effective barrier of the fence shall repose on dry ground.

The permit cites PCSMP 65.62.020, 65.62.030(A)2&5 and 65.62.050(C) as being the residential development regulations of the master program applicable to respondent's proposed fencing development.

The examiner's decision was appealed to the Board of Commissioners of Pierce County which upheld the decision. The substantial development/variance permit as granted was approved by the Department of Ecology (DOE).

III

At the present time there are only two fences on Gravelly Lake which extend waterward of the line of ordinary high water, and neither were constructed under any kind of a shoreline permit. Should the fence proposed by the respondent be approved, the precedent might well encourage further requests for similar fences. The cumulative impact of other such fences would adversely affect the aesthetic quality of the shoreline of the lake and would lessen the public opportunity to enjoy the physical and aesthetic qualities of Gravelly Lake and its natural shorelines. The waters of Gravelly Lake are waters of the state and are open to boating and other recreational uses of the public even though most of the shoreline is privately owned and is not open to the public.

IV

The primary and real purpose of the proposed fence is to prevent appellant's family and the public generally from trespassing on the property of respondent and her husband. Since it is built only along the southerly boundary of respondent's property next to the property of appellant, it is questionable whether the fence, if built, will accomplish its intended purpose.

V

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings, the Shorelines Hearings Board comes to these

CONCLUSIONS OF LAW

I

There were disputes over peripheral factual issues, but there was no serious dispute regarding the material factual issues. The determination of this matter, therefore, rests primarily on resolving the following two issues which largely involve matters of law. These issues are:

1. Is a variance required for a fence under the provisions of the Pierce County Shoreline Master Program (hereinafter PCSMP)?

2. If a variance is required for a fence, does respondent's fence meet the variance requirements of WAC 173-14-150(3)(b)?

II

We conclude that the hearings examiner for the county was correct in determining that a variance is required for respondent's fencing project.

A variance is required for the construction of residential structures waterward of the extreme high water mark under the provisions of PCSMP, Section 65.62.030(A)(5), cited by the examiner, which provides:

> A. Prior to the approval of any residental development and associated roads and utilities pursuant to this Chapter, the appropriate revieweing authority shall be satisfied that: (emphasis added)
>
> . . . .
>
> 5. All residential structures shall be landward of the extreme high water mark. (emphasis added)

III

A fence is a structure within the purview of PCSMP sections 65.62.010[1] and 65.62.030(A)(5). Websters Third International Dictionary defines "structure" very broadly as "something constructed or built." A fence is certainly something that is constructed or built.

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1. 65.62.010 DEFINITION. Residential development shall mean one or more buildings or structures or portions thereof which are designed for and used to provide a place of abode for human beings, including one or two family detached dwellings, multifamily residences, row houses, townhouses, mobile home parks and other similar group housing, together with accessory uses and structures normally common to residential uses including but not limited to garages, sheds, boat storage facilities, tennis courts, and swimming pools. Residential development shall not include hotels, motels, or any other type of overnight or transient housing or camping facilities. (Emphasis added.)

The term residential structure itself is not specifically defined in the master program, but PCSMP 65.62.010 which defines residential development makes it clear that residential development includes not only the place of abode but also the structures normally common to residential uses. A structure common to a residential use is a residential structure. Since a fence is a structure normally common to residential use, it comes within the meaning of the term "residential structure" as used in PCSMP section 65.62.030(A)(5).

IV

The fence in question is a development as defined by RCW 90.58.030(3)(d) which provides:

> (d) "Development" means use consisting of the construction or exterior alteration of structures; dredging; drilling; dumping; filling; removal of any sand, gravel or minerals; bulkheading; driving of piling; placing of obstructions; or any project of a permanent or temporary nature which interferes with the normal public use of the surface of the waters overlying lands subject to this chapter at any state of water level. (Emphasis added.)

Fencing is a use consisting of the construction of a structure. It is also an obstruction.

RCW 90.58.140(1) provides that no development shall be undertaken on the shorelines of the state except those that are consistent with the policy of chapter 90.58 RCW and the applicable Master Program.

RCW 90.58.100(5) makes provisions for variances under some circumstance to allow the construction of developments which would otherwise be precluded by the Master Program.

V

Respondent Grenley contends strongly that a variance is necessary only if the fence is a substantial development. This contention is without merit. Attorney General v. Grays Harbor County, SHB 232 (6/10/77).

It should be noted that WAC 173-14-150(3) refers broadly to "development" and does not restrict its applicability to "substantial development."

PCSMP section 65.62.020 provides that structures having a fair market value of less than $1000, although exempt from the provisions requiring a substantial development permit, must, nevertheless, comply with the prohibition regulations and standards of chapter 65.62.

VI

Since the proposed fencing project which will extend waterward from the ordinary high water mark is both a residential development and a residential structure, its construction will violate Section PCSMP 65.62.030(A)(5) which provides that all residential structures shall be landward of the extreme high water. The extreme high water mark is landward of the ordinary high water mark so a residential structure extending waterward from the ordinary high water is in violation of the provision. Therefore, it can only be constructed if a variance is granted.

VII

Since we have concluded that respondent's fencing project violates the provisions of PCSMP 65.62.030(A)(5), and therefore requires a variance, it is not necessary that we determine whether the fence was

also in violation of PCSMP 65.62.050(C) which requires building structures to be set back 50 feet from the ordinary high water line or lawfully constructed bulkhead.

VIII

Having determined that it was necessary for respondent Grenley to secure a variance in order to construct the proposed fence, it is necessary to determine whether or not the variance granted by the County and approved by DOE meets the variance requirements set forth both in WAC 173-14-150(3) and PCSMP Section 65.72.020. We hold that it does not.

IX

WAC 173-14-150(3), which deals with variances for developments waterward of the ordinary high water mark, sets forth five standards. A development, in order to be eligible for a variance, must meet each of the five enumerated standards.

Respondent Grenley's proposed fencing development located waterward of the bulkhead does not meet the test of standard number (a) which provides:

> (a) That the strict application of the bulk, dimensional or performance standards set forth in the applicable master program precludes a reasonable permitted use of the property.

The strict requirement that a variance will only be granted if the master program standards actually precludes a reasonable permitted use makes it extremely difficult to secure a variance of the bulk or dimensional requirements of a master program when a waterward

development under subsection (3) is involved. It is much easier to secure a variance for a landward development under subsection (2) because the applicant need only show that the standards of the master program will significantly interfere with a reasonable use of the property.

The hardship claimed by respondent and her husband is that without the fence, appellants and others will trespass on their property. This hardship may interfere with the peace of mind of respondent and her husband, and, thus, interfere somewhat with their use of their property, but it does not follow that preclusion from building the fence will preclude a reasonable use of their property. The same prospect of trespass faces other residents around the lake. We conclude that denial of the variance for that portion of the fence waterward of the bulkhead will not preclude respondent and her husband of a reasonable use of their waterfront residential property.

X

Respondents fence project does not meet the test of variance requirement (b) which provides:

> (b) That the hardship described in WAC 173-14-150(3)(a) above is specifically related to the property, and is the result of unique conditions such as irregular lot shape, size, or natural features and the application of the master program, and not, for example, from deed restrictions or the applicant's own actions.

The alleged hardship consisting of trespass by appellant's family and the public is in no way related to, nor is it the result of unique conditions such as irregular lot shape, size, or natural features.

XI

Respondent's fence project does not meet the test of variance requirement (f) which provides:

> (f) That the public will suffer no substantial detrimental effect.

The public interest would suffer a substantial detrimental effect if the variance were to be granted.

The extension of respondent's fence waterward from the line of ordinary highwater would thwart the policies of RCW 90.58.020. With the exception of two existing fences, there was no evidence of structures, other than floats and docks projecting waterward from the line of ordinary high water. Floats and docks serve a practical water oriented purpose, are generally considered to be an acceptable part of a residential waterfront scene and are permitted by PCSMP section 65.56.030.

On the other hand, respondent's proposed fence which will project waterward across the beach will be an intrusion which will have little practical purpose and will be a structure which is foreign to the normal waterfront setting. Its use will not be water related, and it will substantially detract from the beauty of the lake and its shoreline. The cumulative[2] effect of many such fences intruding on

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2. The significance of cumulative effect is set forth in RCW 173-14-150(4) as follows:

> (4) In the granting of all variance permits, consideration shall be given to the cumulative impact of additional requests for like actions in the area. For example if variances were granted to other developments in the area where similar circumstances

to the beaches of Gravelly Lake during the summer low water periodwould seriously compound the adverse effect of respondent's proposed fence.

XII

We hold that respondent's fencing project does not meet the variance requirements of PCSMP 65.72.020(A)(B) & (C) and does not meet the requirement of the same section which provides that applicant must show that she does not have any reasonable use of her property if she must comply with the provisions of the PCSMP.

XIII

The Shorelines Substantial Development/Variance Permit granted to appellant Dorothy Grenley does not meet the variance standards of of WAC 173-14-150 or PCSMP 65.72.020, and should be reversed.

XIV

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions, the Shorelines Hearings Board enters this

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2. Cont.

> exist the total of the variances should also remain consistent with the policies of RCW 90.58.020 and should not produce substantial adverse effects to the shoreline environment.

ORDER

The Shorelines Substantial Development/Variance Permit granted to Dorothy Grenley by Pierce County and approved by the Department of Ecology is reversed.

DONE this 30th day of June, 1981.

SHORELINES HEARINGS BOARD

NAT W. WASHINGTON, Chairman

Did Not Participate
DAVID AKANA, Member

GAYLE ROTHROCK, Member

RODNEY KERSLAKE, Member

STEVEN TILLEY, Member

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Comments:

Correction to page 3, line 19, WAC corrected to 197-11-340. No change to appendix

Sender Name: Kathy Herbstler - Email: kathy@hesterlawgroup.com

A copy of this document has been emailed to the following addresses:

brett@hesterlawgroup.com
kathy@hesterlawgroup.com
coconno@co.pierce.wa.us
dwillin@co.pierce.wa.us